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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 920

THE SOUTHEAST TEXAS CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, ET AL., *Petitioners,*

v.

THE STATE OF TEXAS, *Respondent.*

## REPLY TO BRIEF IN OPPOSITION

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Respondent fails completely to meet Petitioners' first question because no case cited by Respondent even involved the attempted antitrust prosecution of the same petitioner on the same facts by both the federal and state governments.

Respondent's opposition to the Petitioners' second question[1] (namely, whether the Sherman Act occupies the field as to restraints of trade subject to federal power under the Commerce Clause) relies principally on *Standard Oil Co. of Kentucky* v. *Tennessee*, 217 U.S. 413 (1910). This Reply Brief is limited to pointing out two reasons why the *Standard Oil* case does not support Respondent's contentions.

[1] Petition for Certiorari, p. 5. Respondent appears to agree in substance that this case presents this issue. See Brief in Opposition, p. 3, Question 1.

**1. This Court Has Never Considered the Effect of the Sherman Act on State Power**

In the first place, *Standard Oil Co. of Kentucky* v. *Tennessee* concerns only those limits that the Commerce Clause places on state action; it does not deal with the extent to which the Sherman Act reserves to the federal government power over trade restraints "in" or "affecting" interstate commerce. In the second place, Respondent treats the *Standard Oil* case as if it had been decided this year; no allowance is made for the sweeping changes that have occurred over the last fifty-three years in judicial attitudes regarding the scope of the Sherman Act and the Commerce Clause.

Contrary to the Brief in Opposition,[2] neither the *Standard Oil* case nor any other decision of this Court has ever passed on the question as to whether the Sherman Act excludes concurrent state prohibitions against conspiracies in restraint of trade.[3] All parties agree that the case at bar poses this important question squarely.[4] The Court should embrace this opportunity to settle this grave constitutional problem, a problem that is arising with increasing frequency and intensity as state interest in antitrust enforcement awakens.[5]

*Standard Oil Co. of Kentucky* v. *Tennessee* upheld Tennessee's action against a company for giving oil—

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[2] Pp. 6, 10-11.

[3] *Accord*, Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469, 1478-83 (1961).

[4] See n. 1, *supra;* Petition for Certiorari in No. 765, p. 4, Question 1.

[5] See, *e.g.*, Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, Address, A.B.A. Section of Antitrust Law, Annual Convention, Aug. 7, 1962; REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS (1957); Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV. 753 (1961); Stern, *A Proposed Uniform State Antitrust Law*, 39 TEXAS L. REV. 717 (1961).

not in interstate commerce to four local merchants for the purpose of inducing them to revoke orders for oil to be shipped from Pennsylvania by defendant's competitor. The *Standard Oil* case held only that the Commerce Clause did not invalidate Tennessee's action. The case at bar raises the entirely different question of whether the Sherman Act, by occupation of the field, precludes overlapping and duplicating state action.

The apparent reason why the *Standard Oil* case did not address itself to the Sherman Act's effect on permissible state action is that, when that case was decided in 1910, the power of Congress (at least with respect to restraints of trade) was generally not deemed to extend beyond transactions actually "in" interstate commerce.[6] For this reason, it would not have been thought to extend to the transactions involved in the *Standard Oil* case. Not until four years later, in the *Shreveport Rate Cases*,[7] did this Court hold that the Congress had power, under the Commerce Clause, to regulate transactions not actually "in" but substantially "affecting" interstate commerce.

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[6] *Compare* Swift and Co. v. United States, 196 U.S. 375 (1905); Northern Securities Co. v. United States, 193 U.S. 197 (1904) *with* Hopkins v. United States, 171 U.S. 578 (1898); United States v. E. C. Knight Co., 156 U.S. 1 (1895). See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE, ch. VII (1937).

[7] Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342 (1914):

> "The formulation of the Shreveport doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of Cooley v. Port Wardens, 12 How. 299. For, while the latter gave play for state power to work in the field of commerce, the former broke bonds confining Congress' power and made it an effective instrument for fulfilling its purpose." Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 232 (1948).

Mr. Justice Holmes' decision in *Standard Oil Co. of Kentucky* v. *Tennessee* demonstrates that this Court did not consider there to be any federal statute that was concurrent with the Tennessee antitrust law as it was applied in that case. Speaking for a unanimous Court, Holmes wrote:

> "How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law, at least, that excludes the states from a familiar exercise of their power. See *Field* v. *Barber Asphalt Paving Co.*, 194 U.S. 618."[8]

*Field* v. *Barber Asphalt Paving Co.* says of the Sherman Act that:

> "It is not intended to affect contracts which have a remote and indirect bearing upon commerce between the states."[9]

From this it appears that Holmes was certain that the Congress had not acted, and he even raised a question as to whether it had power to act in the matter.

Because *Standard Oil Co. of Kentucky* v. *Tennessee* was decided on the basis that the state had acted only against transactions outside the scope of the Sherman Act and outside the scope of any other federal statute, Respondent's reliance on that case is entirely misplaced. To the extent that the *Standard Oil* case has any pertinence, this Court's careful articulation that the transactions involved were not then subject to any federal statute serves to warn that states may have to yield when conduct does become subject to federal regulation.

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[8] 217 U.S. at 422.

[9] 194 U.S. at 623-24.

In addition to *Standard Oil Co. of Kentucky* v. *Tennessee*, Respondent cites three other decisions of this Court to support its contention that state and federal antitrust regulation may operate concurrently.[10] In the first, *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86 (1909), this Court had no occasion to consider transactions concerning interstate commerce because the trial court had instructed the jury that the state antitrust law had "no reference to . . . arrangements of any character concerning subjects of interstate commerce . . ."[11] Likewise, the two other Supreme Court decisions cited by Respondent in this regard[12] do not address the question of whether the Sherman Act precludes state action against trade restraints affecting interstate commerce. Respondent has not cited, and Petitioners have not found, any decision of this Court that considers the preemption issue raised by the case at bar.

**2. The Sherman Act Occupies the Field as to Restraints of Trade Subject to Federal Power Under the Commerce Clause**

During the fifty-three years that have passed since the decision in *Standard Oil Co. of Kentucky* v. *Tennessee*, the Sherman Act and the Commerce Clause both have broken free of the conceptual bonds that confined their scope in 1910. See, *e.g.*, *Mandeville*

[10] Brief In Opposition, 11-12.

[11] 212 U.S. at 99.

[12] Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949); Watson v. Buck, 313 U.S. 387 (1941). Although the preemption issue was neither presented nor adjudicated in the Giboney case, in March 1955 this Court held in Weber v. Anheuser-Busch, Inc. 348 U.S. 468, that the same Missouri antitrust statute involved in Giboney was preempted by the National Labor Relations Act where interstate commerce was affected. In Weber this Court said of Giboney, "No question of federal preemption was before the Court; accordingly, it was not dealt with in the opinion." 348 U.S. at 481 n. 9.

*Island Farms, Inc.* v. *American Crystal Sugar Co.*, *supra* n. 7, 334 U.S. 219 (1948); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). As the reach of the Sherman Act has expanded, there has been a corresponding limitation on the areas in which either conflicting or coincidental state regulation of restrictive trade practices may permissibly function.

This is so because, when the Congress passed the Sherman Act, it made clear its intent to regulate only activities that the states could not touch. Senator George F. Hoar, floor manager for the legislation, stated, "the jurisdiction of Congress is conclusive over it [the commerce that the bill would regulate]; the States cannot touch it." 21 CONG. REC. 2567. Senator John Sherman spoke of the act as regulating "the commerce over which Congress alone has jurisdiction." 21 CONG. REC. 2462.

Since the Congress intended the Sherman Act to occupy its field to the fullest possible extent,[13] overlapping state regulation is precluded from that field regardless of whether it conflicts or coincides with the federal purpose. See *Campbell* v. *Hussey*, 368 U.S. 297 (1961); *Charleston & W. C. Ry.* v. *Varnville Furniture Co.*, 237 U.S. 597 (1915). Neither in 1890, when the Sherman Act was passed, nor in 1910, when this Court decided *Standard Oil Co. of Kentucky* v. *Tennessee*, were the states free to prosecute citizens for transactions that fall within the field occupied by the Sherman Act, nor are they free to do so today.

In summary, the case at bar raises an important constitutional question of first impression. Almost seventy-three years have passed since enactment of the Sherman Act, and this case now provides an opportunity for the "long overdue Supreme Court ruling,

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[13] Cases cited in Petition for Certiorari, Appendix D, p. 17a.

similar to those delivered recently in other areas of constitutional law, on the role that the states can play in antitrust regulation." Note, *The Commerce Clause and State Antitrust Regulation, supra* n. 3, 61 COLUM. L. REV. 1469, 1473 (1961) (Footnote omitted).

## CONCLUSION

For the reasons set out above and in the Petition for Certiorari, petitioners respectfully pray that this Court issue a Writ of Certiorari to review the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas dated June 12, 1962.

Respectfully submitted,

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